IN THE SUPREME COURT OF FLORIDA

CASE NO. : SC03-2169

In Re:

AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.160

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COMMENTS OF MONTGOMERY BLAIR SIBLEY ON PROPOSED AMENDMENTS TO RULE 2.160

Montgomery Blair Sibley[1], as solicited by this court, submits the following comments on the proposed amendments to Florida Rule of Judicial Administration, Rule 2.160 as published in The Florida Bar News, February 1, 2004:

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[1] As a matter of disclosure, the Court should note that I have pending and directly related to Rule 2.160 and the disqualification of judges: (i) before this Court in *Sibley v. Sibley*, Case Number SC03-1953 and a petition for mandamus filed on February 12, 2004 in *Sibley v. Sibley*, Case Number 3D03-2083 not yet assigned a case number, (ii) *Sibley v. Sibley*, Case Numbers 3D03-2083 before the Third District Court of Appeals and *Sibley v. Sibley* Case Number 3D02-2083 pending before the U.S. Supreme Court, (iii) pending in the United States Supreme Court a petition for certiorari to the Eleventh Circuit Court of Appeal in *Sibley v. Anstead, et al*, Case Number 03-12824-HH and (iv) pending in the United States District Court for the Southern District Of Florida, *Sibley v. Lando*, Case No.: 03-21728-CV-AJ which was recently reversed and remanded by the 11th Circuit Court of Appeal in *Sibley v. Lando*, Case Number: 03-14910-B.

To avoid even the appearance of *ex parte* communication, copies of these Comments are being served on counsel of record in the afore-mentioned cases.

Preliminary Statement

Simply put, this Court does not have authority to curtail by Court Rule substantive rights. Here, both the requirements as to specificity and timing contained in the proposed amendment to Rule 2.160 curtail the substantive rights contained in Florida Statute §38.10 and as such exceed this Court's jurisdiction to make such rules. Moreover, by failing to (i) incorporate the void nature of all judicial acts taken post-filing of a motion to disqualify but pre-determination of that motion and (ii) permitting denial of the motion to disqualify without explanation, this Court continues the possibility for abuse of a litigant's fundamental right to an impartial tribunal.

Accordingly, Rule 2.160 should be amended to comport with Florida Statute §38.10 and enforce the terms of that statute's plain intent.

Comments To Rule 2.160

I. Florida Statute §38.10 Controls Rule 2.160's Scope

Rule 2.160, enacted under the authority of Article V of the Florida Constitution[2] cannot change the substantive right of a party to an action as the Supreme Court's

[2] "The supreme court shall adopt rules for the practice and procedure in all courts. . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. Art. V, § 2(a), Fla. Const. Florida Statutes § 5.371 also provides for superseding effect.

authority to adopt rules is limited to practice and procedure only – not the substantive right to be free of a judge as guaranteed by §38.10 whose prejudice has been raised by a filed affidavit. That right vests under §38.10 when a party "**files an affidavit stating fear that he or she will not receive a fair trial**". Clearly, the Supreme Court does not have the authority under Article V to adopt a rule which vitiates that substantive right. *Accord*: *Lundstrom v. Lyon*, 86 So.2d 771, 772 (Fla. 1956)("Furthermore, it cannot be doubted **that courts may not by rule** of practice either by statutory or inherent rule making authority, **amend or abrogate a right resting** in either **substantive** or adjective **law**."); *Barnhill v. State*, 834, 842 So.2d 836 (Fla. 2002), ("Section 38.10, Florida Statutes (2001), gives litigants the **substantive right** to seek disqualification of a judge. Rule 2.160, Florida Rules of Judicial Administration, sets forth the procedure to be followed in the disqualification process." Emphasis added); *Brown v. St. George Island, Ltd.*, 561 So.2d 253 (Fla.1990).

Plainly then, a conflict between §38.10 and Rule 2.160 must be resolved in §38.10's favor.

II. Proposed Rule 2.160 Improperly Abrogates §38.10

Florida Statute §38.10 "Disqualification of judge for prejudice; application;

affidavits; etc.", states as to the first motion for disqualification:

> **Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial** in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, **the judge shall proceed no further**, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. (Emphasis added).

Hence, all that §38.10 requires is (i) "a party to an action or proceeding", (ii) "makes and files an affidavit", (iii) "stating fear that he or she will not receive a fair trial", (iv) "on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party". This is the only burden upon a litigant.

Rule 2.160, in its present form and through the proposed amendment seeks to curtail that right in two areas. First, by requiring more of the affidavit than §38.10 requires. Second, by permitting the judge against whom the affidavit is filed to rule upon the "legal sufficiency" of the affidavit without articulating the basis for the judge's conclusion. Both encroach upon §38.10 and thus cannot be enacted by this Court.

A. Expansion of the Contents of the Affidavit Is Unauthorized

Rule 2.160 as proposed would graft onto the affidavit required of §38.10 the requirement that a motion to disqualify "allege specifically the facts and reasons upon

which the movant relies as the grounds for disqualification." This additional requirement to the plain and limited statement §38.10 requires expands the basis for disqualification beyond what §38.10 requires: to wit, "an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party". By so expanding, this allows the trial judge to make the subjective conclusion as to whether the "facts and reasons" required by Rule 2.160 are sufficient. Section 38.10 simply doesn't require that of a litigant.

Indeed, the statutory scheme imposes that requirement only after the first judge has been disqualified. The second part of §38.10 which refers to a motion to disqualify a second judge assigned to a case as a result of the disqualification of the first judge states:

> However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on

> the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

Plainly then, §38.10 encompasses a two-step process. First, an automatic disqualification upon the filing of an affidavit with the simply affirmation contained in §38.10. Thereafter, the disqualification only occurs (i) if the subsequent judge admits such prejudice or (ii) on appeal as an assignment of error.

Hence, Rule 2.160 encroaches on this right to disqualification by elevating the first motion to disqualify to a question of fact and law when nothing of the sort is required under §38.10. As such, the present and proposed Rule 2.160 "amends or abrogates a right resting in either substantive or adjective law", *Lundstrom, supra,* to wit, §38.10. As such, it cannot be maintained as a rule of this Court.

B. "Immediate Ruling" means Now, not Thirty Days from Now

In a leap of lexicology only possible in the legal profession, this Court has defined "immediate" in the propose Rule as meaning "no later than 30 days". While completely aware of this Court's decision regarding motions to disqualify in *Tableau Fine Art Group v. Jacoboni*, SC01-943[3], the Court did not consider in that opinion

[3] Which motion to disqualify took the Florida Court System 1112 days or over 3 years to decide and hence it is not surprising that in Florida "immediate" means within 30 days.

the question of the limitations of §38.10 upon Rule 2.160. As such, in considering an amendment to Rule 2.160, this Court should re-visit whether it has the authority to issue this 30 day rule given the restraints of §38.10.

Significantly, §38.10 states in part, "Whenever a party to any action or proceeding **makes and files an affidavit** . . . **the judge shall proceed no further**". Hence, once a litigant "makes and files" the affidavit, the judge has no further jurisdiction to proceed. Thus, the thirty day delay permitted by Rule 2.160 is nullity and serves no purpose as the judge is automatically divested of jurisdiction upon the filing – not the granting of the motion.

This proposition that the filing of the affidavit alone removes the judge from jurisdiction over the matter is supported by a long line of Florida cases. In *Swepson v. Call*, 13 Fla. 337 (1869), in interpreting a similar statute this Court stated, "We think the **jurisdiction of the judge over the cause ceases** whenever it appears, or whenever facts exist, that he is interested in it and that he can "entertain no motion in the cause (other than to have it tried by a competent tribunal) and the Legislature had declared that all orders, degrees and judgment made or entered by such judge, except as stated, shall be null and void." (Emphasis added). Hence, it is the very jurisdiction of the court which ceases when an affidavit to disqualify is made and filed as "proceed no further" is a revocation of jurisdiction by the Florida legislature. Accord: *Suarez v.*

State, 115 So. 519, 524 (Fla. 1928), *Dickenson v. Parks*, 140 So. 459, 462 (Fla. 1932); *Escalona v. Wisotsky* , 781 So.2d 1063 (Fla. 2000) ("This Court holds that a motion to disqualify constitutes record activity regarding a claim of failure to prosecute, and that the trial court's failure to act immediately on the motion to disqualify violated section 38.10 and rule 2.160, as did the trial court's ruling on the motion to dismiss while the motion to disqualify was pending. Thus, the decision below is quashed, the case is remanded, and we approve Lukowsky."); *Breakstone v. MacKenzie*, 561 So.2d 1164 (Fla.App. 3 Dist. 1989) ("It is well settled that '[a] judge faced with a motion for recusal should first resolve that motion before making additional rulings in a case.... [A] recusal motion must be heard first.' *Stimpson Computing Scale Co. v. Knuck*, 508 So.2d at 484. Not only is the procedure well established, but the approach taken here creates, rather than dissipates, a perception that the trial judge attempted to retain the case as an accommodation to withdrawing counsel"); *Wishoff v. Polen In and For Broward County*, 468 So.2d 1035 (Fla.App. 4 Dist. 1985) ("Since the final judgment was entered after petitioner filed her motion for disqualification, it must be vacated."); *Doe Ex Rel. Doe v. Publix Super Markets* 814 So.2d 1249 (Fla.App. 2 Dist. 2002) ("The general rule is that once a party has filed a motion to recuse, the trial judge may not proceed any further in the action, § 38.10, Fla. Stat. (2000)"); *Rogers v. State*, 630 So.2d 513 (Fla. 1993) ("Once the motion for recusal was made, the

present judge, rather than limiting inquiry to a determination of the motion's legal sufficiency, actively participated in, and directed the outcome of, a mini-hearing to determine the truthfulness of the Appellee's allegations against him. . . . Regardless of the legal sufficiency of Rogers' motion, we conclude that he is entitled to a new evidentiary hearing before a different judge because the appearance of bias generated during this mini-hearing was so pervasive it tainted the remainder of the proceeding, as happened in Bundy."); *Dura-Stress, Inc. v. Law*, 634 So.2d 769 (Fla.App. 5 Dist. 1994) (Thompson, Judge, concurring in part; dissenting in part,"In this case, the judge should not have entered any orders after the motion to disqualify was filed. He should have ruled on the motion first, before proceeding to any other matters. I would, therefore, quash the order entered on the motion for net final judgment.");*CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla.App. 2 Dist. 1992) ("Section 38.10, Florida Statutes (1989), and Florida Rule of Civil Procedure 1.432 govern disqualification of a trial judge. Both the statute and the rule are clear that upon presentation to the trial judge of a legally sufficient motion by a party to disqualify, the trial judge shall proceed no further. The trial judge may not debate the allegations contained in the motion, pass on the truth of its allegations, or adjudicate the question of disqualification. See *Townsend v. State*, 564 So.2d 594 (Fla. 2d DCA 1990). The trial judge's actions in this case exceeded the proper scope of his inquiry. It was error

for him to continue in the case and a new trial is required."); *Scussel v. Kelly*, 152 So.2d 767 (Fla.App. 2 Dist. 1963) ("Thus, upon filing of the suggestion of disqualification based on bias and prejudice against an attorney in the cause relators brought themselves within the ambit of the aforementioned statute and the respondent judge was under an affirmative duty to proceed only insofar as was permissive under the statute.").

As such, the 30-day delay rule proposed under Rule 2.160 simply serves no purpose and only invites mischief in the form of void judicial acts taken post-disqualification motion filing.

Accordingly, Rule 2.160 should be amended to reflect that the mere filing of the affidavit is alone sufficient to divest the judge of jurisdiction over the matter and the clerk is to assign the a new judge.

C. Section 38.10 Does Not Require An Attorney's Certificate

As another example of how Rule 2.160 encroaches upon the plain language of §38.10, the requirement at 2.160(c) that "The attorney for the party shall also separately certify that the motion and the client's statements a re made in good faith" adds an additional burden to §38.10 that has nothing to do with this Court's practice and procedure rule making authority. This additional requirement, which could serve as a basis for denying the motion to disqualify, adds an additional person to concur

with the limitation of §38.10 that only "a party" need make the affidavit. Indeed, if the "party to any action " believes the judge is prejudice but his attorney does not and refused the requisite Rule 2.160 certification, then Rule 2.160 has taken away by procedure §38.10's substantive right to be free of a judge that a "party"– and no one else – believes is biased. This Court simply does not have that authority.

III. Rule 2.160 Should Breath Life Into §38.10's "Proceed No Further"

Clearly, §38.10 states in part, "Whenever a party to any action or proceeding makes and files an affidavit . . . the judge shall proceed no further". As detailed above, Florida jurisprudence recognizes that judicial acts taken post-filing of such an affidavit are void.

As such, Rule 2.160 should be express in its statement that the filing of such an affidavit prohibits the trial court from acting on any other matter pending re-assignment of the case per §38.10. Otherwise, a court could be tempted to defer recognition of the motion for – say the now authorized 30 days – conduct hearings and issue rulings before giving judicial recognition to what §38.10 has already pre-ordained: the removal of the suspect judge from proceeding further. Such a hypothesis occurring is much more than mere speculation. *See: Sibley v. Sibley*, SC03-1953.

IV. The Trial Judge Must Explain A Denial Of A Motion To Disqualify

In practice, this Court has required that the trial court only rule upon the sufficiency of the motion to disqualify, without further explanation. *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983)("the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations.")

Hence, a denial of the motion to disqualify is often simply an order stating, "motion denied", without further elaboration as to why. Such a circumstance raises the spectre of the elevation of form over substance in disqualification practice. *Accord*: *Conley v. Gibson*, 355 U.S. 41, 48 (1957)("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.")

Here, that same principal at work in *Conley* is at play here. Indeed, if the denial is upon some fine point of law – an out of date notary jurat, for example – then the purpose of insuring an impartial judiciary is thwarted upon the procedureal horns of Rule 2.160. As such, a denial of a motion to disqualify should be required to state with particularity the reasons why the affidavit was insufficient.

Conclusion

Rule 2.160 as proposed – and as presently formulated – improperly impinges upon the substantive right contained in §38.10. As such, it cannot be amended as proposed or even maintained in its present form without trespassing upon the limitations of this Court's authority as recognized in *Lundstrom v. Lyon*, 86 So.2d 771, 772 (Fla. 1956): "Furthermore, it cannot be doubted that courts may not by rule of practice either by statutory or inherent rule making authority, amend or abrogate a right resting in either substantive or adjective law."

As such, Rule 2.160 must be amended to conform to §38.10's plain mandates.

Certificate of Type Size and Style Service

I HEREBY CERTIFY (a) that this Comment utilizes Times New Roman Regular 14 point proportional type and (b) that a true and accurate copy of the foregoing was mailed by first class mail to (i) Stanford R. Solomon, The Solomon Tropp Law Group, P.A., 400 North Ashley Plaza, Suite 3000, Tampa, Florida 33602-4331, (ii) Jay M. Levy, Attorney for Appellee Sibley, in Case Number SC03-1953, Case Number 3D03-2083 and Case Number 3D02-2083, 9130 S. Dadeland Boulevard, Two Datran Center, Suite 1510, Miami, Florida 33156, (iii) Stephanie S. Curd, Attorney for Respondent Lando in Case Number 03-12824-HH and Case No.:03-21728-CV-AJ, Assistant Attorney General, Office of the Attorney General, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301-5000, (iv) Joanne E. Sargent, Attorney for Respondent Schwartz, in Case Number 03-12824-HH, Third District Court of Appeal, 2001 S.W. 117 Avenue, Miami, Florida 33175 this February 27, 2004.

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February 27, 2004

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Re: CASE NO. : SC03-2169

Greetings:

Please find enclosed the original and nine copies of "Comments of Montgomery Blair Sibley on Proposed Amendments to Rule 2.160", with requisite certificate of service, (ii) a copy of the Comments on 3.5" diskette in WP 10 format and (iii) a SASE to return a date stamped copy of the cover page of the Comments to me.

Please call me with any questions or concerns.

Sincerely,